

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

32124

FILE: B-219837.2**DATE:** August 30, 1985**MATTER OF:** Pacific Fabrication**DIGEST:**

Protest that bid price is too low to be responsive, that the low bidder may not be able to comply with the contract requirements at the price bid, that a bidder was previously terminated for default and that bidders violated the certificate of independent price determination concern affirmative determination of bidder responsibility which is not for consideration by GAO in the absence of a showing of fraud or bad faith by contracting officials or that a definitive responsibility criteria contained in the solicitation have not been applied.

Pacific Fabrication protests any award to a firm other than itself under invitation for bids (IFB) DLA100-85-B-0778 issued by the Defense Personnel Supply Center, Philadelphia, Pennsylvania, for the supply of canteen cups. Pacific Fabrication, the sixth low bidder, protests that the four lowest bidders should be rejected for various reasons as outlined below.

We dismiss the protest.

Pacific Fabrication first protests that it is "extremely disturbing" that award could be made to the low bidder, an Israeli firm, on this small business set-aside procurement. However, we have been informed that the IFB was a partial small business set-aside. A foreign firm can be eligible for award of the non-set-aside portion of the procurement. Federal Acquisition Regulation (FAR), 48 C.F.R. § 19-502.3 (1984).

033025

Second, Pacific Fabrication protests that the low bid is "too low to be responsive." There is no legal basis to object to an award on the basis of a below-cost bid. Environmental Aseptic Services Administration, B-218239, Mar. 5, 1985, 85-1 C.P.D. ¶ 276. Whether a bidder will be able to meet contract requirements in light of its offered price is a matter of bidder responsibility. Id. Before award, an agency must make an affirmative determination that the bidder is responsible. FAR, 48 C.F.R. § 9-103(b) (1984). Such determinations necessarily include a high degree of discretion and business judgment. Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 C.P.D. ¶ 64. Our Office will not review such a determination absent a showing of possible fraud or bad faith on the part of the contracting officials or that a definitive responsibility criterion contained in the solicitation has not been applied. AT&T Information Systems, Inc., B-216386, Mar. 20, 1985, 85-1 C.P.D. ¶ 326. Neither exception has been alleged here. Consequently, this protest basis is dismissed.

Third, the protester questions the economic affordability of the Israeli firm's compliance with "Preference for Certain Domestic Commodities" and "Preference for Domestic Specialty Metals" (DOD FAR Supp., 48 C.F.R. § 52.225-7009 and 48 C.F.R. § 52.225-7012), which were included in the IFB. This allegation also concerns the responsibility of the low bidder, not for consideration by our Office inasmuch as the Israeli firm is obligated to perform in accordance with the contract requirements. See Surgical Instrument Company of America, B-214918, May 22, 1984, 84-1 C.P.D. ¶ 551.

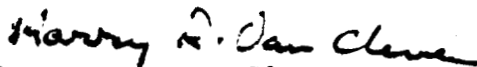
Next, Pacific Fabrication alleges that the second low bidder had a previous contract terminated for default because of its failure to perform. Pacific Fabrication's implication is that this bidder, therefore, should not receive the award. This too is a matter of bidder responsibility not for consideration by our Office. Airtronix, Inc., B-217087, Mar. 25, 1985, 85-1 C.P.D. ¶ 345.

Pacific Fabrication alleges that the third and fourth low bidders' prices are suspiciously close to the second low bidder's price in violation of the "Certificate of Independent Price Determination" clause, FAR, 48 C.F.R. § 52.203-2 (1984). This is also a matter to be considered by the contracting officer in making an affirmative determination of responsibility and our Office will not

review such determination in these circumstances, given its discretionary, subjective nature. DelRocco & Sons, Inc., B-218314, Mar. 22, 1985, 85-1 C.P.D. ¶ 339.

Finally, Pacific Fabrication questions the ability of the fifth low bidder to meet the quantity and delivery requirements based on its past performance. This is also a matter of bidder responsibility.

In view of the foregoing, the protest is dismissed.


Harry R. Van Cleve
General Counsel